Supreme Court, U.S.
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No. 95-1068

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

JOHN D. LUTHER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Based upon the facts presented, did the Petitioner offer sufficient evidence to present a jury question as to contributory negligence?

2. In distinguishing contributory negligence from assumption of risk in a FELA case, is contributory negligence properly defined as a careless act or omission on the Plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist?

LIST OF ALL PARTIES & RULE 29.1 LIST

The only parties to this proceeding are the:

Petitioner: Norfolk & Western Railway Company

Respondent: John D. Luther

The Petitioner Norfolk & Western Railway Company is a subsidiary of the Norfolk Southern Corporation.

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BRIEF IN OPPOSITION

REASONS FOR DENYING THE PETITION

I. THE FACTS WERE MISSTATED BY THE PETITIONER

As with every FELA case, they are fact specific and the application of the law to those facts are entirely dependent upon such evidence. Here, the Respondent respectfully submits that the railroad has misstated the facts in an attempt to elevate this case to one of national importance. The facts here simply do not warrant the Court accepting the petition for certiorari. The Petitioner railroad contends that the trial court applied an improper standard for contributory negligence in directing a verdict against it, which verdict was affirmed in the state appellate courts.

The Respondent, John D. Luther, was working as a laborer for the Petitioner and he was injured while placing a heavy rail saw into the back of a work truck. The crew was short handed at the time. Normally 3-5 laborers are assigned to a crew performing track work to replace defective and damaged rail. On the day in question, the Respondent was the only laborer. Furthermore, the crew was working under so-called "track time" which means that the crew had a certain amount of time to complete the work on the track so that its work would not interfere with any train movements. Both of those factors created by the railroad made it impossible to also clean the truck prior to the end of the work day (Trial. Tr.302-305, 323, 353, 371, 383).[1]

In the process of removing defective rail from the tracks, the pieces are cut into 10 foot sections and then placed in the back of the truck, along with other tools and materials that the crew is using. As the particular crew in question was in the process of moving to a second job site, the Respondent climbed into the back of the truck bed and was handed the saw that was used to cut the rail. He testified that he was standing in the back of the truck and looked for a safe place to lay the saw down, and observed a clear space near the box where the rail saw is normally stored. That storage box was located in the front of the truck bed immediately behind the cab. The Respondent stated that he could not go directly to the box because of 8-10 pieces of rail which were located in the back of the truck and other materials which blocked his path. Each piece of rail weighs between 110-132 pounds. He further testified he could not place the rail saw on top of the piece of old rail and other materials because the blades of the rail saw could easily chip, creating a safety hazard. Also, it would have been a violation of company

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[1] "Trial Tr." refers to the transcript of the trial in the lower court.

rules to place a rail saw on top of debris. Respondent observed a cleared space in the truck and walked to that point with his knees bent and reached out to place the saw in the space. As he reached out to place the saw down, he fell to his knees dropping the saw and he felt a sharp pain in the middle of his back (Pet. App. 3a).

At trial, and in the appellate courts, the railroad contended that it had established sufficient evidence of the Respondent's knowledge of the dangerous condition and of his fault in creating an unsafe condition by failing to clean the truck bed. The railroad states that the Respondent acted negligently and that the jury could disbelieve the Respondent's testimony, and infer that, based merely on the fact the accident occurred, Respondent failed to exercise due care. The Petitioner argues that the Respondent was aware of, created, or contributed to the conditions which resulted in his injury. Furthermore, it says that he should have taken simple and reasonable precautions to avoid the dangerous condition (Pet. Br. 5).

However, the facts in this case overwhelmingly demonstrate that there was absolutely no basis for submitting the issue of contributory negligence to a jury. There was no evidence of any rule violation by the Respondent. He performed his work specifically as directed by his foreman, and in the normal and accepted manner. Regarding the Petitioner's position that Mr. Luther should have cleaned the truck bed before attempting to place the saw down, that is contrary to the evidence. A laborer's job is to perform work as he/she is instructed by the foreman of the crew (Trial Tr.310). The Respondent's foreman testified that the Respondent was working under the foreman's instructions, and that he did not order the Respondent to clean the truck bed and had no intention of having anyone clean the truck bed throughout the day, prior to the completion of the entire job (Trial Tr.358). Furthermore, the crew was short handed, and had to complete all

of the work during the allotted track time, and it was not possible to continuously keep the truck bed cleaned or to have a laborer spend time cleaning it. (Trial Tr.302-305, 323, 353, 371, 383). Only where there is a full complement of laborers, one laborer is sometimes placed on the truck to keep it clean throughout the day. (Trial Tr.302-305, 383).

II. THERE IS NO REAL CONFLICT IN THE CIRCUITS

The very narrow issue presented here by the Petitioner is whether or not a contributory negligence instruction should have been given based on the facts adduced at trial. Petitioner's attempt to assert a conflict within the courts is not even reached here, because no contributory negligence instruction was appropriate, irrespective of what the proper standard might be. Furthermore, the undersigned has been unable to find any case which suggests that there is a split in the courts as to the standard to follow regarding contributory negligence in FELA cases. As noted in *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 60-63 (1943), there are various facets to the assumption of risk doctrine, one being the overlap between assumption of risk and contributory negligence. That is the aspect faced in the present case.

A frequently cited opinion by Justice Kennedy when he was a member of the Ninth Circuit, sets out in proper perspective what this petition is all about. See *Taylor v. Burlington Northern Railroad Company*, 787 F.2d 1309, 1316 (9th Cir. 1986). While the facts in that case are not similar to the case at bar, the legal principles are the same. That court noted that there is some overlap between assumption of risk and contributory negligence, but generally the two defenses are not interchangeable. It defined assumption of risk at common law as an employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties. Contributory negligence, in contrast, was defined as a careless act

or omission on the Plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist. This was similarly expressed earlier by Professor Bohlen in *Contributory Negligence,* 21 Harv. L. Rev. 233, 249 (1908):

> Voluntary assumption of risk is the mere passive subjection by the Plaintiff of himself to the risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability *to add new danger's* to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct. (Emphasis added)

Stated another way, contributory negligence implies a careless act or omission on the part of the servant *superimposed* upon the mere necessary acceptance of known conditions negligently created or permitted to exist by employer. *Mumma v. Reading Co.,* 247 F.Supp. 252, 256-257 (E.D. Pa. 1965). In *Paul v. Missouri Pacific R.R.,* 963 F.2d 1058, 1060 (8th Cir. 1992) the court noted that the *tending to add new dangers* in the definition of contributory negligence *captures the necessary elements when the negligence of the defendant and the negligence of the plaintiff combine to create a single situation from which a sudden and indivisible injury arise.* Whether or not the employee acted reasonably in increasing the dangers which already existed, because of the railroad's negligence, is nothing more than another way of expressing contributory negligence. Also, it better puts into focus the situation that arguably could be considered assumption of risk, but also may be contributory negligence.

The *Taylor* court pointed out that defenses once embraced substantially within the concept of the assumption of risk are barred under FELA and may not be revised in the form of contributory negligence, and where an act

of alleged contributory negligence is the practical counterpart of assumption of risk, it does not constitute a defense. 787 F.2d at 1316, citing *Tiller* 319 U.S. at 58. This Court in *Tiller* warned that " 'unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumptions of the risk under another name;' " *Id.*

As in *Taylor*, the case at bar presents in essence an assumption of risk defense, and not one based on contributory negligence. The Respondent was performing a routine assignment in compliance with instructions from his supervisor. It is well established that contributory negligence may not be submitted to a jury where the employee merely acceded to the request or direction of his supervisor. See *Louis v. Timco Inc.*, 736 F.2d 163, 167 (5th Cir. 1984). As in *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257 (2d Cir. 1973), the Petitioner's theory here is really an assumption of risk masquerading under another name—contributory negligence. The railroad must meet its affirmative burden that there is some evidence of negligence by the employee, before any instruction on contributory negligence should be given. The Respondent submits that, based upon the facts of this case, the Petitioner woefully failed to meet its burden. The only argument presented at trial by the Petitioner as to the Respondent's possible contributory negligence was that he failed to clean the truck bed before putting the rail saw down. As noted previously, the Respondent's foreman testified that the Respondent was working under the foreman's instruction, and that he did not order the Respondent to clean the truck bed and had no intention of having anyone clean the truck bed throughout the day prior to the completion of the entire job (Trial Tr.358). Moreover, no safety rules of the railroad were violated by the Respondent.

The position of the railroad in the lower courts was that a jury could have disbelieved the Respondent and

inferred that since the accident occurred, he failed to exercise due care. This simply does not raise to the level of contributory negligence, despite what the Petitioner asserts in this Court. A contributory negligence instruction is inappropriate where the railroad's allegation is nothing more than the incredibility of the Plaintiff's testimony. See *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66, 69 (8th Cir. 1985); *Dixon v. Penn Central Co.*, 481 F.2d 833, 837 (6th Cir. 1973).

The Petitioner states that the contributory negligence standard used in the trial court was improper because the railroad had to establish a careless act or omission on the Respondent's part tending to add new dangers to the conditions that were created by the railroad. This standard is just another way of stating that the railroad must offer some proof of negligence other than what it created itself. A Plaintiff in a FELA case is not chargeable with any negligent conduct of his/her employer. Rather, Plaintiff is only chargeable with his/her own conduct. Therefore, the jury may consider only what the Plaintiff did, or failed to do, at the time and place in question, which is necessarily a requirement that new dangers had to be added by the Plaintiff to the conditions that were already created by the railroad. That does not relieve a Plaintiff from the duty to exercise reasonable care for his/her own safety.

The Petition is a poorly veiled attempt to show a conflict in the circuits where none really exists. The alleged split arises because Petitioner obfuscates the distinction between certain aspects of assumption of risk and contributory negligence. Depending upon the specific facts of a case, the railroad must establish that the employee added other dangers to an already dangerous condition which it created before there can be contributory negligence. This is both logical and sound law, because the railroad must show that the employee added to a danger apart from that created by the railroad.

The cases cited by Petitioner to support its argument that a split in the circuits exists are distinguishable on the facts. Each one presents situations that would normally embrace assumption of risk, but alleged added unreasonable acts of the Plaintiff was treated by the railroad as equivalent to contributory negligence. In *Tersiner v. Union Pacific R.R.*, No. 90-3361, 1991 WL 225897 (10th Cir. Oct. 30, 1991), the Plaintiff had been standing on a pallet while in the process of obtaining ice and water and he fell when his shoe slipped through a slot. By standing on the pallet, he violated a company rule, and evidence showed that other workers did not stand on the pallet. In *Gish v. CSX Transportation, Inc.*, 890 F.2d 989 (7th Cir. 1989), the Plaintiff suffered back injuries while attempting to remove a heavy manhole cover. The court found that the Plaintiff used a pry bar when he could have used a carhook or forklift, and he didn't seek assistance. The Seventh Circuit concluded that a jury could reasonably find from the evidence that Plaintiff's actions did add additional dangers to an already dangerous situation. *Id.* at 992. In *Birchem v. Burlington Northern R.R.*, 818 F.2d 1047 (8th Cir. 1987), the Plaintiff was injured while using a defective mudjack.[2] The use of unsafe or defective equipment violated a company rule. There was no evidence that Plaintiff in any way failed to use proper care in operating the machine, and the court held that a contributory negligence instruction would have been improper under those facts, because Plaintiff did not add to the danger. *Id.* at 1049. The facts in the *Taylor* case did not involve an injury resulting from unsafe physical conditions.

The Petitioner argues at p. 11 that the Third Circuit "generally submits the issue of contributory negligence to

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[2] That lawsuit involved two separate accidents but only the mudjack incident is relevant to this decision. A mudjack is a machine used along railroad track which lifts the track with its "jaws".

the jury under a 'reasonably prudent person' standard, but that it still considers the doctrine of assumption of risk, citing *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1280 (3d Cir. 1995). Respondent submits that the Third Circuit's method of distinguishing between assumption of risk and contributory negligence are very similar to the Seventh, Eight, Ninth and Tenth Circuits. All recognize that there needs to be a distinction drawn between contributory negligence and assumption of risk in certain types of FELA cases.

The Fifth and Sixth Circuit cases and the state cases within these Circuits cited by Petitioner to support its position that a split in the circuits exist are not on point. In *Tipton v. CSX Transportation, Inc.*, No. 91-3333, 1992 WL 43540 (6th Cir. March 9, 1992) (unpublished decision), the jury did not reach the issue of contributory negligence because it found that the railroad was not negligent.[3]

The Fifth Circuit case, *Kendrick v. Illinois Central Gulf R.R.*, 669 F.2d 341, 344 (5th Cir. 1982), even recognized that an employee may not recover for injuries occasioned by his own neglect "of some independent duty", citing *Dixon v. U.S.*, 219 F.2d 10 (2d Cir. 1955). This is no different than saying that the employee has to add to the negligence already created by the railroad in order to be contributorily negligent. In the other cited Fifth Circuit case, *Page v. St. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965), the court was concerned only with proximate cause, and not the nuances between assumption of risk and contributory negligence.

Finally, even assuming *arguendo* that the standard used by the lower court was in error, it certainly was no more than harmless error, because of the facts established in this

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[3] Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case.

case, no instruction of contributory negligence would have been appropriate.

CONCLUSION

In conclusion, the Respondent submits, that based upon the facts of this case, the issue presented by Petitioner is not worthy of any further consideration by this Court, and the petition should be denied.

Respectfully submitted,

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